IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EDWIN F. MEYER and EMAR GOLDBERG, *Plaintiffs in Error,* *vs.* THE UNITED STATES OF AMERICA, *Defendant in Error.*	No. 2413

Brief of Defendant in Error

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STATEMENT OF THE CASE.

The "Navy Yard Cases", insofar as this appellate court is concerned with them at this time, will be briefly summarized for the court:

The Puget Sound Navy Yard is located at Bremerton on the west side of Puget Sound and at a distance of approximately twelve miles from the city of Seattle, both cities being situated in the state of Washington. The Puget Sound Navy Yard is a national naval base, rapidly growing in importance, and as such has demanded and for the purpose of the government is supplied with numerous warehouses which are grouped under the control of a Navy Paymaster, who is ordinarily known and termed "Storekeeper" of the Yard. The warehouses thus under the general direction and control of the Storekeeper contain all the varied and numerous assortment of materials and supplies necessary both for the repair of ships and the replenishing of the stores used by the sailors of the navy. Prior to the visit of the Atlantic fleet to the Pacific coast (an occurrence of the spring and summer of 1908), the Storehouse at the Navy Yard was of considerable less importance than it became immediately prior to that visit and has since remained. The Atlantic fleet left the Atlantic coast just prior to the first of the year 1908, and the first of the fleet to anchor in the waters of Puget Sound reached Bremerton in the latter part of May of the

same year. With the purpose of anticipating the visit of this important squadron, Paymaster Ray Spear was detailed from his post of duty then at Mare Island Navy Yard, California, in the early part of January, 1908, to duty at the Puget Sound Navy Yard, and assumed charge of the Storehouse at that station. Paymaster Spear there found in the office of the Paymaster the plaintiff in error, Edwin F. Meyer, who was carried upon the pay-rolls of the office as principal clerk, and who was at the same time performing the duties of chief clerk. Subordinate to Meyer and subject to his orders was a clerical staff, fourteen to twenty in number, as the same might vary from time to time. It was one of the chief requirements of the duty then confronting Paymaster Spear to immediately assemble a considerable quantity of stores to meet the requirements of the usual demands of the Navy Yard and anticipate in all reasonable measure the unusual demands which would be occasioned by reason of the visit of the Atlantic battleship squadron.

It is necessary for the court to know that the situation confronting Paymaster Spear and his sub-

ordinates was not an easy one, and carried with it a responsibility which should not be underestimated or unappreciated. The stores under his direction and control were at that time, and have since remained, considerably in excess of $1,000,000.00 in value. In this great Storehouse were included no less than thirty thousand separate and distinct classes of articles housed in five or six warehouses of considerable size. In charge of each warehouse was a "Stockman", whose duty it was to accept or deliver upon proper requisition or demand the various stores committed to his care. For each article in any warehouse a stock-card was kept which would show at a glance the actual balance of that commodity or article then on hand in the Storehouse, this card following from day to day and week to week the rise and fall of the quantity of that particular article or commodity. In the office of the Storekeeper nearby and adjacent to the desk of Meyer, as principal clerk, were the stock ledgers, showing the general account of all commodities and supplies kept in the Storehouse. These ledgers would show at a glance to any one familiar with them the receipt or disbursement of any commodity or supply received or distributed through or under

the direction of the Storekeeper. For example: By turning to the ledger under proper classification under the head of "Zinc Plates 6x12" there would be shown, by proper examination, the recent receipt of supplies of that particular commodity, as well as drafts against it. In other words, in the office of the Storekeeper was maintained a ledger system which would show at a glance to any one familiar with its contents the recent receipts of material or supplies kept on hand. From this great quantity of material and supplies it was the custom to distribute, upon proper requisition, to the different bureaus in the yard, as well as to the ships calling at the station. The method of replenishment of the stock on hand, as disclosed by the record, followed this general working plan. If any bureau in the yard required the use of any metal or similar material, it was quite generally the custom to telephone plaintiff in error, Meyer, at the Storekeeper's office, or send by messenger to the Storehouse in which the particular metal was housed. If this metal was not on hand it was quite generally the custom for the bureau requiring the metal, or commodity, to make oral request for this material, and thereafter a request would be prepared by or under the direction

of Meyer, the principal clerk, for the material or commodity needed. The Storekeeper and his assistants in the purchase of supplies were obligated to follow strict requirements of certain federal statutes, as well as the requirements of the Navy Department, which had the same force and effect. A requirement of the statute in force at the time was to the effect that in the purchase of supplies, the estimated value of which was in excess of the sum of $500.00, the purchase should be by advertisement in a form and manner prescribed. In the event, however, that the material was immediately required, the statute and regulations permitted, upon the order of the Secretary of the Navy alone, the bids to be waived and the purchase to be made in the open market. In the event the purchase was in excess of $500.00, the requisitions above referred to were prepared in the following manner: An original and five copies were prepared, of which number the original ultimately found its way to the Paymaster General of the Navy, two were retained in the office of the Storekeeper, one was sent to the Navy Pay Office in the city of Seattle, and the others transmitted to the several bureaus and departments. The Navy Pay Office, as it is com-

monly referred to in the record, was located during this period of time in the Walker Building in the city of Seattle, and it was the province and function of the Navy Pay Office in the city of Seattle to provide for the payment of the public bill and expense so incurred by the issuance of a check or checks to the persons named in the public bill. For the purpose of payment, the government had provided the naval officer in charge of the Navy Pay Office at the city of Seattle with a certain fund which he had deposited to his account as a Paymaster of the United States Navy in the National Bank of Commerce in the city of Seattle. The record discloses that the Paymaster in charge of the Navy Pay Office at the city of Seattle during the time referred to in the indictment was R. H. Orr, and there was employed in the office as clerk J. A. Kettlewell, with one or two other employes whose names are not material so far as the record discloses. The record discloses that the Kettlewell referred to had been for a number of years a civil service employe of the United States, and for a number of years prior to his employment in the office of the Navy Paymaster of the city of Seattle Kettlewell had been employed at the Puget Sound

Navy Yard and there attached to the office of the Storekeeper. While so employed Kettlewell had become closely acquainted with the plaintiff in error, Meyer, and this personal and business friendship continued until long after the period of time referred to in the indictment. It was the business of the Navy Pay Office in the city of Seattle, upon receipt of proper requisition from the Storekeeper's office at the Puget Sound Navy Yard, to provide by advertisement, whenever required, for giving proper notice of the purchase by the government of the material needed. Under ordinary circumstances and in the absence of a waiver of the public notice, proper advertisement was made by posting and publication in such periodicals as would comply with the requirements of the regulations. In event, of course, of requisition in excess of the sum of five hundred dollars, publication was necessary excepting in those cases in which publication was waived by direct order of the Secretary of the Navy. After the issuance of proposals and the award, payment was made for various purchases by disbursement through the National Bank of Commerce in the city of Seattle.

HISTORY OF REQUISITION NO. 438.

The history of Requisition No. 438 insofar as is material in this review is as follows:

In the month of December, 1907, Kettlewell, the principal clerk in the Navy Pay Office at Seattle, observed that the Great Western Smelting & Refining Company and its manager, Emar Goldberg, were obtaining some very profitable contracts through the Puget Sound Navy Yard. The record in the case shows, even prior to this time, numerous occasions upon which Goldberg was the successful bidder against others offering the same commodity at a less price. Since Kettlewell kenew Meyer intimately and had at least a close acquaintance with Goldberg, he conceived the idea that since Goldberg seemed to be profiting by more than friendly consideration at the hands of some one in the Storekeeper's office, that he, Kettlewell, should be permitted to participate in the matter. Kettlewell took the matter up with Goldberg, and out of this conversation grew a promise that he, Kettlewell, would be taken care of. Thereafter several contracts came through the hands of Kettlewell, which seemed to the advantage of Goldberg, and Kettlewell pro-

fessed to believe that Goldberg had not kept faith with him, so, during the month of January, 1908, a requisition for 4,000 pounds of zinc 6x12 came through Kettlewell's hands and was awarded to Goldberg at what was undoubtedly a most profitable and extravagant price. Goldberg on this occasion, as seems to have been his custom, furnished, on this requisition for 4,000 pounds of zinc, an excess of nearly 50 per cent. This placed Kettlewell in a position to complain of the excess delivery as well as the excess in price. Kettlewell wrote, or dictated, a letter, signed of course by his superior, to the Storekeeper's office at the Navy Yard, complaining of this particular requisition. This written complaint brought down from the defendant Meyer a bitter oral criticism that Kettlewell had made his action a matter of record, and the history of this requisition in itself is a most striking corroboration of the entire statement of Kettlewell. When the criticism of Kettlewell reached the Navy Yard, it went to the Commandant, and was by the Commandant referred to the Storekeeper for investigation and report. The history of this communication shows, by the statement of Paymaster Spear and that of Meyer himself, that it was never

returned through naval channels as the ordinary course of procedure of naval affairs would require. Thereafter, incidentally, an excess requisition for the amount in excess of 4,000 pounds of zinc was prepared by the defendant Meyer and regularly put through for delivery. As Kettlewell had temporarily "blocked" the convenient arrangement existing between Meyer and Goldberg, it became necessary for Goldberg to free the Seattle office and Kettlewell from dangerous interference. It is Kettlewell's statement that during the latter part of January, after this requisition had been held up, as heretofore described, Goldberg came to the Navy Pay Office in Seattle and called Kettlewell into the hall. As a result of a short conversation Goldberg then handed Kettlewell the sum of $100 and suggested that "this would settle all former matters," and that thereafter Kettlewell would be entitled to participate to the extent of 20 per cent in the profits of any bid awarded as a result of the combination between Meyer, Kettlewell and Goldberg. Goldberg also explained at this time that Meyer would likewise receive 20 per cent of the profits. It was also stated at this time that at some time later Meyer was to put through a big requisition for zinc and

that Kettlewell was to be on the lookout for this. In connection with this statement of Kettlewell's as to the reason for this payment, the attention of the court is called to Goldberg's own explanation of the singular financial arrangements existing between Kettlewell and himself.

FINANCIAL RELATIONS BETWEEN GOLDBERG AND KETTLEWELL.

Beginning at page 778, Volume 3, of the transcript is a long explanation from the lips of Goldberg concerning his recollection of the financial relations existing between Kettlewell and himself.

> "Q. * * * You loaned him $75 about the 1st of February?
>
> A. Yes, sir.
>
> Q. When did you loan him the next $75?
>
> A. Probably about a week or ten days later.
>
> Q. A week or ten days later he borrowed $75 more?
>
> A. Yes."

All of these pages are interesting on the same point.

About February 1, 1908, the government authorities at Washington set about procuring for the Storekeeper at the Puget Sound Navy Yard a sup-

ply of 6x12x½ inch zinc plate. The zinc plate referred to is commonly used at or about the heavy metal fastenings which support and attach the rudders and screws of battleships, as well as within the boilers for the purpose of counteracting the chemical action of sea water.

During the month of February, referred to, by purchase from and out of the office of the Secretary of the Navy at Washington a full car of 50,000 pounds of zinc of this particular size was purchased from Matthison & Hegler Zinc Co., located at La Salle, in the State of Illinois. This consignment of zinc was purchased by the government at the price of $7.13 a hundred, or seven and thirteen-hundredths cents per pound. This consignment arrived at the Puget Sound Navy Yard the 11th day of March, 1908. The bill of lading and other naval routine papers relative to this consignment passed across the desk of the plaintiff in error, Meyer, and bore upon their face his own initials and handwriting. Proper entry was made by some clerk in the office in the large ledger nearby the plaintiff in error, Meyer, showing receipt of this car of zinc and the price at which it was purchased.

On April 1, 1908, or approximately three weeks after the receipt of the full car of zinc, weighing 50,000 pounds, first referred to, the supply of which was undiminished, a requisition was prepared by the plaintiff in error, Meyer, for a full car of zinc, to-wit, 50,000 pounds of exactly the same dimensions, to-wit, 6x12x½ inch. The record discloses that at the time this requisition was prepared and forwarded there had been no request from the warehouse man, Lockwood by name, for additional supplies, and at the time of the preparation of the requisition no requests had been received at the Puget Sound Navy Yard to supply the ships of the Atlantic battleship squadron. In this connection it should be noted by the court that the usual and customary supply of 6x12x½ inch zinc, as fixed by the stock card in the warehouse, was 8,000 pounds, and that the warehouse of the government at the Navy Yard already was abundantly supplied. The plaintiff in error, Meyer, after the preparation of a requisition for 50,000 pounds of zinc, and with the ledger revealing that the last former purchase by the government within a period of three weeks showing a purchase price of $7.13 per hundred, fixed a cost price upon his requisition of $12.50 a

hundred. To insure its purchase through the Seattle office, where the requisition could have the kindly attention of his friend Kettlewell, Meyer writes in his own handwriting across the original requisition a request that advertisement be waived, conforming in this particular to the requirement of the statutes and regulations that the purchase of any material in excess of $500, without advertisement, could only be done upon the direct order of the Secretary of the Navy.

It will be borne in mind by the court that requisitions for supplies were numerous and the duties of Paymaster Spear, an exceptionally conscientious officer, were burdensome in the extreme. It was the custom in the office, after Paymaster Spear's arrival, that any matter to which his personal attention should be called should bear a white tag or slip in order that his attention might be attracted to the matter. While this particular requisition for 50,000 pounds of zinc was in itself the heaviest requisition going through the Paymaster's office during all of this strenuous period, with possibly the exception of one and that was for beef, the matter was never especially or particularly called

to the attention of Paymaster Spear, who signed the requisition. When the requisition was originally prepared, the quantity was given as 50,000 pounds, at the estimated price of 12½c a pound, while the total sum extended on the right was given as $650, and a rapid computation will show that by an extension of the proper amount it should have read $6,500. It was the custom in this office to lay down before the Paymaster the original requisition on top of the several copies. The original, which was consigned to the Paymaster General, was not expected to have extended on its face the amount of the estimated cost. It is apparent from an examination of the photographic copy of the original requisition and the various copies offered that when this was presented to Paymaster Spear and he rapidly turned back the original to glance at the copy beneath that he would have found a proposed purchase of 50,000 pounds at an estimated cost of $650. It would have been very easy under the circumstances for the principal clerk to then explain that it should read 5,000 pounds and that the estimated price of $650 was correct, or, in the event the matter passed the scrutiny of the Paymaster, that another cipher should be added to the amount, causing it to read

$6,500. At any rate, at some time subsequent to its original preparation another cipher was added to the $650 causing it to read $6,500, and this is the face value of the estimate as it now appears. The request of Meyer, through the Paymaster, was conformed to by the Secretary of the Navy and in due course of time the Navy Pay Office at Seattle was by telegram directed to make the purchase requested. After discussing the matter with Goldberg, Kettlewell then prepared a number of proposals which were thereafter distributed to such persons and companies as would result in the least harm to the arrangement between Meyer, Goldberg and Kettlewell. An examination of the record will disclose that of all eight of the proposals personally distributed or received in connection with this proposed purchase, each and all of them was conclusively explained to the jury as offering no real competition in the proposed purchase. In the requisition as prepared by Meyer, the time of delivery for the commodity was fixed at fifteen days. After conference with Goldberg this was changed by Kettlewell to read five days, and this is the time when, according to the statement of Goldberg, there was not a car of zinc of this par-

ticular size on this entire Pacific coast. Some of those persons to whom proposals were taken are substantial and reputable concerns of the city of Seattle, but these, it will be noticed, bear upon their face, the suggestion that they are unable to furnish the commodity. No one of the eight several bids submitted on this occasion was a genuine competitive bid, free from criticism as to its origin and lack of good faith. On the day of the proposals, April 11, 1908, Goldberg telegraphed to Mattheson Hegler Zinc Co. at Lasalle, Illinois, for the car of zinc, showing a supreme confidence in his knowledge of the zinc market in Bremerton and Seattle. In the examination of these proposals it should be borne in mind that under the testimony of Goldberg each and all of the bids submitted to the Puget Sound Navy Yard by either W. A. Corder, one of the defendants herein, and also one of the bidders, or the Great Western Smelting & Refining Company, was a community or partnership bid between Corder and the other concern. (Goldberg pp. 794-795-8 Transcript.) The record discloses, however, according to the statement of Goldberg, that he was irritated at his friendly competitor at this time and he desired to "put one over" on Corder, as the

expression is quoted from the witness Silverstone.

BID BY SILVERSTONE.

Goldberg then went to the defendant Silverstone a few days prior to the award and told Silverstone that he wished Silverstone to put in a bid in the name of the Fowler Metal Company. Silverstone demurred somewhat at first, but upon Goldberg's assurance that he could procure the written authority from the Fowler Metal Company for him, Silverstone was persuaded to act, and signed a proposal in the name of that company. The agreement between Corder and Goldberg, according to Goldberg, was that Corder should submit a bid of $12.60 a hundred, and the Great Western Smelting & Refining Company should at the same time submit a bid of $12.50 a hundred. At the suggestion of Goldberg, Silverstone submitted a bid in the name of the Fowler Metal Company of $12.45 a hundred. On the day of the award Corder was present in the office when the award was made to Silverstone, and the Fowler Metal Company, and made a remark to Kettlewell to the effect that "Silverstone was a friend of Jimmie's" (meaning Goldberg), and intimating that his own trust and confidence had been

betrayed. Both Silverstone and Goldberg substantially agree as to what happened thereafter. Silverstone was on the next day after the award called down to a conference with Goldberg, in which a mysterious explanation was made to him that this competitor had been threatening trouble, and suggesting to Silverstone a fanciful remark, afterwards made by Silverstone to Corder, intimating that he (Silverstone) had heard Corder talking over the telephone. Peace was again restored to the allies, and the award was made to the Fowler Metal Company at $12.45 per hundred. Although the award was made on April 15, 1908, and required a delivery in five days, it was not in fact delivered at the Navy Yard until the 9th day of May, following. *The car actually delivered was the car ordered by and delivered to the Great Western, but the successful bidder was the Fowler Metal Company.* When the consignment of 50,000 pounds arrived from Illinois, Goldberg, serene in his confidence as to the generosity of his friend Meyer, added to this consignment something over 9,000 pounds of plate of the same size. This was accepted by the Navy Yard, although it was an uncontradicted fact in the record that 10% or more in excess of the amount of a commodity

requisitioned for was considered by government authorities as an "excessive delivery", and a habit of excessive deliveries would result at a normal yard in a rejection of all bids from the offender.

HISTORY OF CHECK.

On May 26, 1908, or something over a month afterward, Paymaster Orr prepared a check, drawn on the National Bank of Commerce at the city of Seattle in the sum of $7,417.09 payable to the order of the Fowler Metal Company for the amount of the public bill for the zinc hereinbefore referred to. The record is not clear as to the time of the delivery of this check or the person to whom it was delivered. Silverstone was of the opinion that he personally obtained the check (Tr. p. 454).

> "Q. Did you personally get the check or did Mr. Goldberg get it?
>
> A. My best recollection is that I got it."

The time of the receipt of the check is likewise a disputed point in the record. Silverstone was of the opinion apparently that it was received on June 1st, while Kettlewell was under the impression that it was delivered to some one at the date indicated

on its face, May 26, 1908. The statement of Silverstone is found at page 454 as follows:

> "Q. * * * What did you do with the check when you got it?
>
> A. I took it down to Mr. Goldberg, who was waiting for me at, I think, the Butler Hotel; in fact, I am sure it was the Butler Hotel; and I handed him the check."

Then follows a lengthy description of the arrangement made between them and of the fact that Silverstone made a trip to the bank while Goldberg waited to learn the result. Silverstone fixes this date at June 1, 1908, (Tr. pp. 456-457).

> "Q. The banker's slip shows you had two checks that you deposited there, one for a small amount and the other for this amount, and that was crossed off, that would be of the date—approximately what was the day when you first went into the bank?
>
> A. I think June 1st.
>
> Q. June 1st, 1908?

On this date, at the suggestion of Goldberg, Silverstone attempted to exchange checks with Goldberg and for that purpose took the Navy Pay check to Silverstone's own bank and attempted to deposit it to his (Silverstone's) account. The bank teller at

the window on this occasion notified Silverstone that the endorsement of the Fowler Metal Company would not be accepted by the government officials unless the name of some officer was subscribed with the name of the company. Silverstone was reluctant to sign the name of the Fowler Metal Company and he went back to where Goldberg was waiting for him and Goldberg then endorsed the name of E. S. Fowler as manager, with some designation which is not clearly decipherable, on the check. After the check was successfully deposited Silverstone gave to Goldberg Silverstone's check in the same amount, $7,417.09, and this check was in due course, to-wit, June 2, 1908, deposited by Goldberg in Goldberg's own bank to his own personal account.

On the same day, June 2nd, as shown by the other checks offered in evidence, a settlement was effected between Goldberg and his co-conspirator, Corder, and the settlement so arrived at, which includes the other items, as well as this particular requisition 438, leaves in Goldberg's hands an unexplained balance of $631.00. This balance of $631.00 is exactly identical with the profit made

in requisition 438, and corresponds and corroborates perfectly the testimony of Kettlewell that he was to receive 20% of the profit in the transaction.

PAYMENT FOR ZINC.

The record discloses with reference to this matter of payment for the requisition 438 that the check of Paymaster Orr, after deposit to the account of Silverstone, passed through the Seattle clearing house and was on June 2, 1908, charged against the funds of the United States then standing to the credit of Paymaster Orr.

Testimony of E. K. Riley, Auditor of Seattle National Bank (Tr. p. 513):

> "Q. I will ask you whether or not, from the records and books of that bank, that check was, in due course of business, cashed and charged against the account of Paymaster Orr of the Uniter States Navy, being a part of the government funds of the United States?"
>
> WITNESS: "A check of this amount was paid against Paymaster Orr on account of *June 2, 1908,* and charged against the funds there in his hands as Paymaster."
>
> WITNESS (Tr. p. 513): "This check had been deposited in the First National Bank and was cleared on the Seattle National Bank on *June 2, 1908.*"

ARGUMENT.

(The italics used in quotation herein are those of the brief writer unless otherwise indicated.)

The defendants were indicted under Section 5440 of the Revised Statutes, the same being the ordinary conspiracy statute, with which the court is familiar. It will be recalled that Section 5440, Volume 2, page 247, Revised Statutes, provides for punishment if two or more persons conspire either "to commit an offense against the United States or to defraud the United States in any manner, or for any purpose." As the court is well advised, this section provides for two distinct classes of offenses, the first covering conspiracies to commite offenses and the second covering conspiracies to defraud the United States.

The indictment in this case at bar charges the defendants (Tr. p. 7, Vol. 1) with *"knowingly to defraud the United States of divers large sums of money by means of a certain fraudulent scheme, devised by the said* Edwin F. Meyer, J. A. Kettlewell, W. A. Corder, Emar Goldberg and E. Silverstone, and which was then and there in process of execution by them."

This section further provides that the conspiracy (Tr. p. 8) "was continuously in process of execution in said western district of Washington * * * *from the 1st day of April, 1908, to and including the 2nd day of June 1908, and was then and thereafter in process of execution by and between the said Edwin F. Meyer (et al.)"*

> (Tr. p. 13): "It was the further object and purpose of said unlawful conspiracy, that the United States should pay for said zinc, rolled sheet, boiler plate a price greatly in excess of its real value, and *that said conspirators should obtain for themselves* an exorbitant and unreasonable profit."

And at line 17 on page 13 of the Transcript: That they *"should appropriate and convert to their own use such unreasonable profits so fraudulently to be realized."*

It will be noted that the object of this conspiracy was to *defraud the government of the United States of large sums of money.* It will also be noted in this connection that the indictment set forth the scheme or plan by which this object was to be consummated. This scheme or plan involved the use of a number of written instruments to effect that purpose. While the indictment does not name

them, it included the use of, (a) an original and five copies of the requisition, (b) order from the Secretary of the Navy directing the waiver of advertisement, (c) the issuance of written proposals, (d) the award and notice of award to the successful bidder, (e) the preparation and issuance of a public bill, and (f) the preparation and issuing by the Paymaster of a check payable to the successful bidder.

All of these steps were necessary to and preceded the accomplishment of the purpose and object of the conspiracy, and that was to obtain public money of the United States. Each and all of these several steps was an essential requirement to the consummation of this fraud, and no one of them can be said to arise superior to the other as a necessary step to be done by these conspirators.

There is no intimation or suggestion at any time or place in the record, and there never was in the trial of the case, that these defendants were charged with attempting to procure a government check, nor were they ever charged with attempting to procure the original requisition issued by the defendant Meyer. Each and all of these instruments

was an essential instrument to the conspirators in their work, but neither of these instruments in itself was of value to the defendants.

The record discloses, and it should be noted by the court, that the real participation of the defendant Corder in this particular enterprise was *begun subsequent to the award and subsequent to the time when the check was deliverable,* and *ended after June 2nd,* when the money had been obtained.

It will be noted from the record that the conspirators were still in a dangerous position, even after the delivery of the check to one of their number. The court in an examination of this point is confronted with some confusion in the record:

It was the statement of Goldberg (Tr. p. 808) that he obtained the check from Kettlewell.

> "Q. Now, when you received this check for $7,417.09 from the United States Government from whom did you obtain it?
>
> A. From Mr. Kettlewell.
>
> * * * * * *
>
> Q. You testified, I believe, in your direct examination, it was May 26th, 1908, is that right?

A. Yes, sir."

Silverstone's recollection is to the effect that he obtained the check (Tr. p. 454), from Kettlewell.

"Q. Did you personally get the check, or did Mr. Goldberg get it?

A. My best recollection is that I got it."

A photographic copy of the check was then shown to the witness and he was again asked:

"Q. I will call your attention to the endorsements on the back of that check. What did you do with the check when you got it?

A. *I took it down to Mr. Goldberg, who was waiting for me at, I think, the Butler Hotel; in fact, I am sure it was the Butler Hotel; and I handed him the check.*"

Then follows on page 455 of the Transcript an account of Silverstone's two trips to the bank; the first time being turned back by the teller because the name "Fowler Metal Company" had not the signature of an officer appended to it. (T. 457.)

"Q. * * * Approximately what was the day when you first went into the bank?

A. I think June 1st.

Q. June 1st, 1908?"

The deposit slips which are exhibits in this case

as well as the testimony of the witness Howell, assistant cashier of the First National Bank, corroborate Silverstone's statement as to the two trips on this same day made by Silverstone to the bank, although Howell's recollection of the matter, after a period of some time, is not clear or definite. (Tr. p. 504.)

> "Q. But there was some conversation at that time between yourself and Mr. Silverstone?
>
> A. Yes,. The check was given back to Silverstone by me for some reason, and my impressions is it was on account of there was no official endorsement on the back of the item. I can't—
>
> Q. But it was turned back at that time when it was first presented?
>
> A. Yes, that would be very natural.
>
> Q. Was this check afterwards presented for payment, or was it deposited in regular course in your institution?
>
> A. Yes, sir."

The dates as fixed by Silverstone are confirmed by Howell. He further states that Silverstone's check in an equal sum was on the 2nd day of June, 1908, charged to Silverstone's account on the books of his bank.

With an indictment in this form and with these facts apparent in the record, counsel for the plaintiffs in error have devoted practically all the pages of a voluminous brief to the contention, adroitly phrased and ingeniously insisted, that the delivery of the check by Kettlewell marked the end of the conspiracy; and since this delivery was, *according to Goldberg's statement,* on May 26, 1908, the statute of limitations had run by reason of the fact that the indictment was not presented in the case at bar until May 29, 1911, more than three years after this date.

As that part of the record hereinbefore quoted demonstrates, this entire and lengthy argument of counsel proceeds upon two theories, equally fallacious. For, in the first instance, there was evidence before the jury that the check was actually delivered on June 1, 1908, and therefore three years had not passed. In the second instance, the indictment did not charge the defendants with the offense of attempting to procure a check, but with the offense of defrauding the government of money.

Counsel for plaintiff in error cite for consideration on this point about one hundred cases, all of

which, as we view the matter, have no possible relevancy. They are for the most part cases involving a *single* act of misconduct, itself inhibited as an offense. These have no bearing upon a crime such as conspiracy, consisting, as this does, in a series of acts, none of which may, in themselves be unlawful, but all of which taken together lead to the accomplishment of an unlawful object.

Considering, for the moment, the single act, designated as a crime, there seems little doubt that, if a criminal fraud is perpetrated by one person upon another with the purpose and end of securing a check for money, the courts will permit the institution of a criminal proceeding either for the check itself or for the money which it represents. The numerous cases cited by counsel are those cases which support the criminal courts in the attempt to prosecute crime in those instances where the prosecutions are based upon the check rather than upon the procurement of the money itself. An equal number of cases could be cited, probably greater in number, which support the indictments and informations based upon the money rather than upon the check. In other words, courts have

been disinclined to turn criminals lose upon the quibble as to whether the check itself was the thing of value or the money which could be paid against it. All of these decisions are directed to the same point, and are, as we view it, of absolutely no value to the court in the determination of the appeal in the case at bar. Here the defendants are charged with a conspiracy to obtain something of value. They are charged with conspiring to secure, not a requisition; not a public bill; not a proposal; not a check; but public money of the United States, and this conspiracy, beginning as it did on January 1, 1908, ran its long and stealthy course through a period of months, or even years. The record discloses that after the check was procured the defendants were then in a peculiar predicament, which threatened to thwart the very purpose of the conspiracy, and that was to obtain the money. After the check was obtained some dismay is apparent among the defendants, who had not yet accomplished their object and purpose. This check bears date May 26th, 1909, and it was not deposited by Silverstone until June 1st, 1908, a period of exactly five days. Counsel for the plaintiffs in error would not render themselves ridiculous by

suggesting to the court that this check made payable to the Fowler Metal Company was of any value to these conspirators in that form. They could not divide it into several parts and distribute it among the several members of the conspiracy. The writer yields to no one in his admiration for the lithographic beauty of our governmental pay-checks, but it has never seemed possible that one of these could, like Joseph's coat of many colors, be divided into smaller parts and each part retain any real or proportional value. It is apparent that when the check was delivered and two of the conspirators, Goldberg and Silverstone, were scheming in the Butler cafe and bar over a method and plan to convert this Paymaster's check into money, that the conspiracy was yet alive and active and was actually unaccomplished. With each successive step of this conspiracy there may have come to the conspirators a feeling of exultation at the particular advance of the conspiracy. When the requisition was issued and had successfully passed the Paymaster at the Nevy Yard, carrying with it an estimate of $12.50, a hundred, that was undoubtedly a cause for congratulation for the cause of the conspirators; likewise, when an order was obtained for the purchase of the

zinc, without advertisement, it seemed that the plan or scheme was working admirably; when, however, it had advanced sufficiently far that there was actually delivered into the possession of two of the conspirators a check of the government, made payable to the order of the Fowler Metal Company (with which neither of these men was in any wise connected), it was then that the most daring and desperate part of the conspiracy was really enacted. Silverstone refused to sign the name of the Fowler Metal Company, because he had no authority to do so, and took the check back to his friend Goldberg, waiting in the Butler Hotel. Confronted with this irritating dilemma, Goldberg did not hesitate, but signed the name of the Fowler Metal Company, by E. S. Fowler, President, thereby adding forgery to his long list of offenses.

Those who heard the testimony, and the jury by their verdict, stamped as fraudulent and false the weak and insincere explanation of both Goldberg and Fowler as to the part the Fowler Metal Company played in this transaction. In this connection, it might be asked, and the question was never answered in the trial: If the relations between Gold-

berg and Kettlewell were not intimate and close in the degree sworn to by both Kettlewell and Goldberg, how did it come about that Kettlewell delivered to Goldberg, who was a bidder for this particular zinc, a check which was intended for one of his rivals, the Fowler Metal Company, with an office in San Francisco? Goldberg, himself, insists that he received the check, and this statement of his becomes only the more convincing corroboration of the friendly relations that existed between Kettlewell and Goldberg.

The evidence in the case, conforming to the allegations in the indictment, which provide that "this money should be divided between Edwin Meyer, J. A. Kettlewell, Emar Goldberg, acting for and as the agent and manager of said Great Western Smelting & Refining Company; W. A. Corder, acting for and as the manager of W. A. Corder Company, and E. Silverstone (Tr. p. 13), shows conclusively, insofar as figures can demonstrate any fact, that on and after the 2nd day of June, 1908, these conspirators divided the proceeds of the check paid for the zinc among themselves in accordance with the agreement described by Kettlewell.

PAYMENT.

Payment is defined by Bouvier's Law Dictionary as follows:

> "The fulfilment of a promise, or the performance of an agreement.
>
> "The discharge in money of a sum due. It implies the existence of a debt of the party to whom it is owed, and the satisfaction of the debt to that party."

The author further states:

> "It is now a law that payment must be made in money, unless the obligation is by the terms of the instrument creating it, to be discharged by other means."

The author further declares:

> "Giving a check is not considered as payment; the holder may treat it as a nullity if he derives no benefit from it. Provided, he has not been guilty of negligence so far as to cause injury to the drawer; 2 B. & P. 518; 4 Ad. & E. 952; 4 Johns. 296; 30 N. H. 256; 78 Cal. 15. See 17 R. I. 746; 8 Misc. Rep. 535; 4 Tex. Civ. App. 535; 39 Minn. 340; 101 N. C. 589; 59 Mo. App. 610."

In the case at bar the defendants are charged with conspiring to defraud the United States. The fraud upon the United States is represented not by

the total amount of said check, that is, $7,417.09, but is represented by the difference between that sum and a reasonable price bid at the time in honorable and open competition. So, it will be seen that when the check was delivered and uncashed it contained legally two dissimilar and different funds: One sum would represent the sum honestly and fairly due for material really furnished, and the other sum would represent that part of which the United States was defrauded. Not until this check was cashed was it possible for the conspirators to segregate and divide among themselves the unlawful loot of their enterprise.

The American & English Encyclopedia of Law, Second Edition, under the head of "Payment," Volume 22, page 569, states the general rule of law with respect to a check as follows:

> "It is a well settled and universally recognized rule that when a debtor has given his check for the amount of his indebtedness, the *prima facie* presumption arises that the check was taken merely as conditional, not absolute, payment, and in case the check is not honored upon due presentation the original indebtedness for which it was given continues to exist, and recovery may be had by the creditor without resorting to the debtor's liability on the check."

An entire page is cited by the author in support of that declaration.

In this connection the court's attention is called to the fact that upon the delivery of this zinc an obligation was then due from the United States government, not to Goldberg, nor Kettlewell, nor Corder, nor Silverstone, nor to any other member of this conspiracy, but an obligation was then due from the United States government to the Fowler Metal Company. One of its public servants then prepared a check, signed by himself as paymaster, but directed to a bank in which was deposited public funds of the United States. This check, in the absence of fraud, was then the property of the Fowler Metal Company, and was not the property of Silverstone, Goldberg or any other member of the conspiracy. The United States government, through its recreant agent, Kettlewell (a conspirator), delivered this check, not to the Fowler Metal Company in San Francisco, but delivered it either to Silverstone (a conspirator), as he claims, or to Goldberg (a conspirator), as is claimed by Goldberg, but at no time and never at any time, according to the view at least accepted by the jury, was this check ever delivered to the Fowler Metal Com-

pany, its rightful possessor. In this connection there is further suggested to the court that the evidence in the record is undisputed that the name "Fowler Metal Company" was never endorsed upon the check until June 1, 1908; therefore, if it may be assumed for the moment that Goldberg ever had any lawful authority to sign the name of "Fowler Metal Company" or "E. S. Fowler" as its officer, he never exercised that authority until June 1st, which was within the period of the statute of limitation. In other words, technical possession and ownership of this check from the Fowler Metal Company, even accepting the act of Goldberg, fraudlent though it was, at its full value, never passed from the Fowler Metal Company until its endorsement was actually made on June 1st, 1908.

While counsel for the plaintiffs in error have cited something over one hundred cases in support of the general declaration that this check constitued payment and the end of the conspiracy, the greater part of them have no relevancy and cannot be reviewed in any brief of reasonable length. Reference is had, however, to certain of the cases upon which counsel seems to generally rely.

While the aspect of a check changes with the declaration of various legislatures taking the matter in consideration, counsel goes back to the case of *Marreco vs. Richardson,* 15 Am. & Eng. Ann. Cases, 329, and quotes at length from the opinion of Lord Justice Farwell. The attention of the court is called to the statement of the lord justice, as follows:

> "And I should myself prefer to say that the giving of a check for a debt is payment conditional upon the check being met; that is, subject to a condition subsequent."

This rule of law has since changed, insofar as the decisions of the courts of the United States are concerned, and the rule of law undoubtedly now is that

> *"A check is not payment unless by express stipulation or distinct agreement of the parties, they so agree."*
>
> *Hatcher vs. Coiner,* 75 Ga. 728.
>
> *Kermeyer vs. Newby,* 14 Kan. 164.
>
> *Marrett vs. Brackett,* 60 Me. 524.
>
> *Selby vs. McCullough,* 26 Mo. App. 66.
>
> *Barton vs. Hunter,* 59 Mo. App. 610.
>
> *People vs. Baker,* 20 Wend. 602.

Where the check is dishonored, the creditor may resort to the original claim:

> *Camptoir D'Escompte de Paris vs. Dresbach,* 75 Cal. 15; 20 Pac. 28.

Purser checking on government funds and payment thereof being stopped does not constitute payment:

> *Taylor vs. Wilson,* 52 Mass. 44; 145 Am. R. 180 (11 Metc.).

Counsel has referred to the case of *Norton vs. United States,* 205 Fed. 593, and quotes at length from the opinion of the court therein. It is difficult to conceive how this case could be deemed of value in support of the contention of the plaintiffs in error. Here the money of the bank issuing the draft was affected from the moment of issue. In the case at bar, the government funds were not affected until a properly subscribed check or draft was presented for payment. It should be borne in mind that the money on which Mr. Orr was drawing was not his own, and his check became nothing more than a draft or sight draft of a government employee upon government funds. The Treasurer of the United States at Washington might or might

not honor this draft, as it seemed to him fit and proper. In this connection, it may be noted that these checks or drafts drawn by the paymaster are not returned to him personally, but are forwarded to the Treasurer of the United States.

Reference is made to the case of *State vs. Briggs,* 7. L. R. A. 278, in which the Supreme Court of Kansas upheld a conviction for a fraud in which the defendant was charged with unlawfully obtaining a check for money, the check afterward being cashed in another county. Prosecution was brought in the county in which the check was issued, and it was held that venue would lie for the fraud. This decision is only in line with the many decisions which support transactions based either upon the check itself or upon the deed, and we have no doubt that a prosecution would have been sustained in that particular case if the action had been brought in the county in which the check was cashed, based upon the procurement of the money itself.

Reference is several times had by plaintiffs in error to the case of *Lonabaugh vs. United States,* 179 Fed. 476. This is a prosecution for conspiracy for obtaining certain public lands of the United

States and all of the acts of the conspiracy were committed more than three years prior to the bringing of the indictment. In that connection, the words of Judge Van Devanter are quoted at page 479:

> "But as a preliminary to so doing it should be observed that no act can be so regarded unless it was a positive rather than a passive one; was the act of one or more of the conspirators; and was done to effect the object of the conspiracy."

Comparison should be made with the opinion of the court as written by Judge Van Devanter, basing his decision upon the fact that all of the acts done by the conspirators were more than three years prior to the presentment of the indictment, with the facts in the case at bar, where the record shows without conflict of testimony that the two conspirators, Goldberg and Silverstone, were conferring together and actually signed the check on the first day of June, 1908, and within three years of the presentment of the indictment.

IT IS THE GENERAL RULE THAT NOT EVEN A PROMISSORY NOTE WILL OPERATE AS PAYMENT OF PRE-EXISTING OBLIGATION.

This rule of law is enunciated in several decisions of the Supreme Court of the United States. In the case of *Duncan vs. Kimball,* found in 3 Wall. 37; 18 L. Ed. 50, Mr. Justice Field said:

> "By the general commercial law, as well of England as of the United States, a promissory note does not discharge the debt for which it was given, unless such be the express agreement of the parties. * * * The creditor may return the note when dishonored and proceed upon the original debt."

The words of Chief Justice Marshall were quoted with approval in the case of *Segrist vs. Crabtree,* 33 L. Ed. 126:

> "That a note, without a special contract, would not, of itself, discharge the original cause of actions, is not denied."

Many other cases of equal dignity could be cited in support of the same declaration.

If, then, it is the rule of law that an instrument of the high dignity and character of a promissory note does not in itself constitute payment, with how much greater force does it impress the mind that a mere check, which is but an order for the payment of money, can, under no circumstances, be deemed a payment and discharge of a debt or obligation.

THE STATUS OF A CHECK IN THE STATE OF WASHINGTON.

The check in question was delivered in the City of Seattle, King County, Washington,—assuming for the moment that the action of Kettlewell constituted an actual delivery on the part of the government. This action of the paymaster and that of Kettlewell in delivering the check referred to, would be, under the general rule construed by the rule of law obtaining in the State of Washington.

The attention of the court is called to Section 3575 of Remington & Ballinger's Code of the Statutes of the State of Washington, found in Volume 2, page 150:

> "A check is a bill of exchange drawn on the bank, payable on demand. Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check."

Section 3519, same page, reads as follows:

> "A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check."

(Laws of 1899, page 372.)

Section 3517, page 142, of Volume 2, of the same work, reads as follows:

> "A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof, and the drawee is not liable on the bill unless and until he accepts the same."
> (Laws of 1899, page 363.)
> See
>
> *Frederick & Nelson vs. Spokane Grain Co.*, 47 Wash. 85.

In the case of *Benham vs. Columbia Canal Co.*, 74 Wash. 110-119, the court declares the rule of law of the State of Washington to be:

> "It is the general, if not the universal, rule that payment in anything other than money can only be made upon the distinct agreement of the creditor with the consent of the debtor to accept the thing as payment."

In the case of *Exchange National Bank vs. Hunt,* 75 Wash. 516, a written guarantee had been given to secure the payment of an open account. Subsequent to the giving of this guarantee a note was given by the debtor and the guarantor was not a party to this instrument. Thereafter a second note was given, taking up the original similar obligation.

The original guarantor having died, it was sought to assert against his estate the obligation of his guaranty, and it was contended on behalf of his estate that the acceptance of the note by the grantor discharged the obligation of the guarantor, for the reason that the note was accepted in payment of the original obligation. The Supreme Court denies this at page 517 and uses the following language:

> "The question then is, did the taking of the promissory note for a pre-existing liability, which was covered by the guaranty, constitute a payment of the debt, and thereby release the guarantors? The rule is that the taking of a promissory note for an antecedent liability does not constitute a payment of the debt in the absence of an agreement to that effect, or evidence that such was the intention of the parties."

Numerous authorities are offered in support of that doctrine.

The attention of the court is called to Section 325, Huffcut on Negotiable Instruments, at page 79, which reads as follows:

> "A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check."

THE OBJECT OF THE CONSPIRACY.

This appellate court has recently had presented to it, with great force and earnestness, the appeal in the case of *Houston & Bullock vs. United States,* and the judgment of the lower court has recently been affirmed. While the opinion of the court has been so recently handed down as to not at this time be available for inspection, it is apparent from the record that there was there presented the contention of counsel that the statute of limitation would begin to run from the time of making the award, and learned counsel there insisted that this was the definite act that would toll the statute of limitation. All the force and persuasive logic which is used in the present case was there used to induce the court to believe that the conspiracy had as its object the mere securing of a contract, but it was contended on behalf of the government, as it is here contended, that the purpose and object of the conspiracy was to secure *money,* not to acquire merely a written memorandum. If ingenious counsel for plaintiffs in error were permitted to select some one of the numerous steps which might be found necessary in a long and involved conspiracy, and fix their finger upon that as setting in motion the statute of limita-

tion, it would be easily possible for many offenders of this kind to escape punishment. In the case at bar, this conspiracy which began on or about the first of the year 1908, actually continued for a period long after the first day of June of 1908. This was but one of numerous offenses, and the indictment selected this particular transaction as being one of the many of a general working agreement. There is nothing to be said in favor of May 26th, the time of the issuance of the check, as tolling the statute of limitation, that could not be said with equal force as to the date of making the award, or the date of the issuance of the requisition. Each and all of these were intermediate and necessary steps to the consummation of a purpose which is clear and apparent to any one familiar with the greed for money so overpowering in the breasts of many men.

THE STATUTE OF LIMITATION.

It was formerly contended in conspiracy litigation that the statute of limitations began to run from the time of the formation of the conspiracy. This theory of law has long since been abandoned and it is now the well settled principal of law that the statute of limitations runs from the date of the

last overt act in furtherance of the conspiracy. This court has passed upon the question in the well remembered case of *Jones vs. United States,* 179 Federal 584. In this case, as in the case at bar, some of the overt acts were outside of the statute of limitations, while certain of these acts brought the offense within the prescribed period. In deciding this case Judge Morrow uses this language (p. 610):

> "Under this rule the overt acts alleged in the indictment and established by proof continued the conspiracy to the time within the statute of limitations."

The same principal was prior to that time adopted by Judge De Haven in the case of *United States vs. Brace,* 149 Federal 874. Judge De Haven, at page 877, uses the following language in describing conspiracy:

> "The crime consists in putting the corrupt agreement into active operation, and so long as it is in operation the offense is a continuing one. This being so, my conclusion is that, whenever a person commits any act in pursuance of an existing conspiracy, no matter when such conspiracy was formed, or how many precedent acts have been committed for the purpose of effecting its object, the offense defined in Section 5440 of the Revised Statutes is then

committed, and is subject to prosecution. * * * There can be but one prosecution, based upon a single conspiracy, and this is not barred as to any overt act within the statutory period."

In the case of *United States vs. Barber,* 157 Federal 889, where the plea of statute of limitations was again raised, Judge Quarles, in discussing the point says (p. 892):

> "If the law is correctly laid down in *Ware vs. United States,* 154 Fed. 578, it is the existence of the conspiracy rather than its formation which is the material fact, and that the conscious participation by the defendant within three years in an existing conspiracy makes it a crime within the purview of Section 5440, without regard to the time when the unlawful combination was in fact formed. This case may be said to be an innovation in the law, but it is a well reasoned and instructive case."

In the case at bar it will be remembered by the court that the record here discloses that at least two defendants, Silverstone and Goldberg, were, on June 1, 1908, and within the statute of limitations, endorsing this check for deposit in Silverstone's bank. The record discloses that after that time plaintiff in error Goldberg was busy in the distribution of the funds so obtained to the various beneficiaries of this corrupt agreement.

The attention of the court is called to the case of *United States vs. Driggs,* 125 Federal 520. This was a criminal proceeding instituted against Driggs for a violation of Section 1781, it being charged that Driggs was, while a congressman, interested in the proceeds of a contract entered into for the sale of certain automatic cashiers to the United States. The company interested executed the following instrument:

> "Watertown, Wis., May 25, 1899.
>
> "For value received, we promise to pay George F. Miller or order, twelve thousand five hundred dollars, without interest, on receipt of the proceeds of sale of 250 or more automatic cashiers, sold May 19, 1899, to the United States Post Office Department."

This instrument was in turn assigned by Miller to the defendant, he assisting in procuring the contract from the government. From time to time at various periods of time subsequent to the date of this instrument, payments were made to Driggs. It was contended on the part of the defendant that the statute of limitations should begin to run from the date of the instrument, while it was there contended on the part of the government that the statute of

limitations ran from the payments of money made pursuant to the terms of the contract. Judge Thomas, for the Eastern District of New York, uses the following language (p. 521):

> "The instrument dated May 25, 1899, was not negotiable, and therefore no value could be added to it by transferring it. In any case, whether it was 'property' or a 'valuable consideration,' within the meaning of the statute, so that an indictment could be based upon it within three years after its delivery to Driggs, depends upon its nature and value at the time of such delivery. At the outstart it is obvious that the instrument of May 25, 1899, embodied in part the agreement pursuant to which Driggs undertook to procure the contract from the government, and fixed the condition and times when he should receive compensation therefor. Although it be a fragment of such agreement, and such agreement was originally not in writing, the instrument of May 25th has the same qualities as if it contained all the terms of the agreement. An indictment otherwise correct, charging that the defendants offended by making the agreement, or by being parties thereto, would have been valid, if found within three years from the time of making it, as Section 1781 in terms forbids such an agreement to be made. *But an indictment based upon the instrument as embodying the agreement is quite different from an indictment for giving or receiving 'money,' 'property,' or 'other valuable consideration' upon the theory that such agreement was itself 'property'.*"

The court goes further in its opinion to state that this agreement had no validity for the very reason that it was forbidden by statute and therefore void. In the case at bar it can very clearly, by analogy, be reasoned that since the delivery by Kettlewell of the check for $7,417 was itself a fraudulent act, the entire transaction or method of delivery was tainted with fraud, which the government could have disclaimed at any period to the very moment of payment, or even thereafter. And the court holds the indictment would lie by reason of the fact that it was brought within three years of the payment of money under this fraudulent and criminal arrangement.

In the case of *Brown vs. Elliott,* 225 U. S. 400; 56 L. Ed. 1136, which was an application for a writ of habeas corpus, and contests the sufficiency of the indictment and the facts proven in support of an indictment in one of the notorious "Big Store" frauds, so familiar to readers of the daily press, a contention was made that no participation by one of the defendants was shown within the period of three years prior to the filing of the indictment. The Supreme Court, speaking by Mr. Justice Mc-

Kenna (p. 1140), quotes with approval the language of the court used in *United States vs. Kissel,* 218 U. S. 601, in which it was said:

> "But when the plot contemplates bringing to a pass a continuous result that will not continue without the continuous co-operation of the conspirators to keep it up, and there is such continuous co-operation, it is a perversion of natural thought and of natural language to call such continuous co-operation a cinematographic series of distinct conspiracies, rather than to call it a single one."

The court then further remarked:

> "These remarks are especially pertinent to the case at bar. It is alleged in the indictment that the conspiracy set forth was designed to be and was continuous; *and, being so, every overt act was the act of all the conspirators, made so by the terms and force of their unlawful plot.*"

Adoping the reasoning of the court there used by Justice McKenna, to the case at bar, it is apparent that the act of Goldberg in subscribing this check in the name of Fowler Metal Company on June 1, 1908, and the act of Silverstone in depositing it to his account was in each instance an act for the benefit of each and all of the conspirators charged in the indictment.

The attention of the court is directed to the fact that the delivery of this check by Kettlewell as the representative of the government was made, not, by mailing a check to the address given on the bid, to San Francisco, but by the delivery to one of the conspirators in the transaction. This action of Kettlewell was a part of the same fraud and tainted every action in connection with the delivery.

If this be true, then there was no legal, binding delivery made by Kettlewell upon this occasion, and no act upon which to predicate a claim that the statute of limitation would begin to run. The only two acts in connection with the check which can in any measure be considered to be bona fide acts of the government would be the act of Paymaster Orr in drafting the check, and the act of the bank on June 2, 1908, in cashing it. The intermediate acts are each and all of them tainted with the fraud of the various conspirators. Each and every person handling the check from the moment it received the signature of Paymaster Orr, until it was deposited in Silverstone's account on June 1, 1908, was a party to this conspiracy, and charged as defendants in the case.

Counsel has referred to the decision in the case of *Hyde vs. United States,* 225 U. S. 356-358; 56 L. Ed. p. 1119. This learned court is so familiar with this case that it would seem impertinent to attempt anything more than a reference to it. It will be remembered that practically every act of the Hyde conspiracy was performed well outside of the three-year limit. The conspiracy was complete, but the object was yet unaccomplished. While the project slumbered certain acts within the statute were done to hurry forward the time when the unlawful fruits of conspiracy might be acquired. The Supreme Court held the evidence would sustain the charge. The court (p. 1122, L. Ed.), speaking through Mr. Justice McKenna, quotes with approval the language of Judge Woods in the case of *U. S. vs. Britton,* 108 U. S. 199, as follows:

> "The provision of the statute that there must be an act done to effect the object of the conspiracy, merely affords a *locus penitentioe* (court's italics), so that before the act is done, either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute."

This is the language of the highest court of the Federal government and due weight must be given

to its clear and convincing declaration. If we measure the position of the defendants in the case at bar by this rule, would counsel for plaintiff in error still insist that their clients could not, without injury to the government, have repented of their misconduct after the receipt of this check?

Is it not apparent that at any time after its receipt, whether on May 26 or June 1, 1908, before it was deposited, the conspirators could have repented of the conduct and the government would then have sustained no loss. Even after deposit, and before it was presented and charged against the government account on June 2, they could have repented and the government would have been uninjured. Goldberg and Silverstone could have destroyed the check and the United States would not have sustained loss.

There remained to these conspirators a precise, definite moment, up to which time it was well within their power to repent and turn back from their purpose, and that was the exact moment when this chack was stamped as paid and charged against the government fund on the books of the National Bank of Commerce. This date was June 2, 1908.

No distortion of the rules of logic can lead the mind to any other conclusion than that this was the day and hour when the government was defrauded, and the object of the conspiracy was accomplished. The certain test, as laid down by the Supreme Court, is that during all the time, until this moment, it was in the power of the conspirators to reconsider, deliberate and abandon their unlawful purpose.

EVIDENCE AS TO SALES OF ZINC.

Evidence was offered on behalf of the government as further substantiation of the fraudulent conspiracy leading up to this particular purchase, that the estimate fixed by Meyer and the bids offered in accordance with the agreement between the conspirators was outrageously extravagant, unreasonable and fraudulent. The ledger of the Storekeeper's office, reposing on a shelf within twelve feet of Meyer's customary desk, and at all times under his observation, showed the arrival at the Navy Yard of an exactly similar amount, almost three weeks to a day prior to that of April 1, 1908, the date of requisition 438, at a cost to the government of $7.13 a hundred. The estimate fixed by Meyer was $12.50 a hundred; a tabulation was made by Mr. House, an

expert accountant, in the employ of the government, and an employee of unusual skill, showing the prices of zinc of similar size, asked and obtained by the firms of Corder and the Great Western Smelting & Refining Company, for a period of many months prior to April 1, 1908, and for a number of months thereafter.

The period of time before, after and during the history of requisition 438 was fully covered.

Testimony was offered by the witness Nagus, and several Seattle representatives to show the usual and normal profit in sales of zinc similar in quality and size.

It would seem that no better nor fairer evidence could be obtained than that taken from the books of the defendants themselves.

Mr. House was called, not as an expert on the price of zinc, but as an expert accountant, able to fathom the mysteries of modern bookkeeping, and with the further ability to summarize this clearly for the court, counsel and jury.

On the question of the admissibility of the testimony of expert accountants, the attention of the court is called to the following citations:

Elliott on Evidence, Vol. 2, Sec. 1053:

"Accountants and Actuaries. * * * As they are competent to testify as to errors in an assessment book (15) and as to the results of the computations from the books and schedules of the assets and debts of a party, the same having been put in evidence (16). Such matters as the last are more in the nature of matters of fact rather than mere opinions, and it was observed by the court, in the last case cited that the witness did not state deductions and inferences of his own judgment, but did state results of computations. In another case, however, an accountant, who had been a bookkeeper and teller in a bank, was held competent to testify to handwriting by comparison. Citing *Tumberlake vs. Brewer,* 59 Ala. 112; *Jordon vs. Osgood,* 109 Mass. 457; 12 Am. R. 731; *Frick vs. Kabaker,* 116 Iowa 494; 90 N. W. 498."

Elliott on Evidence, Section 1030:

Limits of Rule: "Where the facts can be placed before the jury and they are of such a nature that jurors generally are just as competent to form opinions in reference to them, and draw inferences from them as witnesses, then there is no occasion to resort to expert or opinion evidence. * * * But there are matters relating more or less to everyday affairs, rather than to any technical and obstruse science or art, on which ordinary men in the usual walks of life may have little knowledge, and on which the opinions of those who have given them particular study and have special and peculiar skill and experience may be helpful, and in such cases the opinions of such witnesses are fre-

quently admitted as the opinion of experts, although they are not, perhaps, in the fullest and most complete sense. * * * It is applicable wherever peculiar skill and judgment applied to a particular *subject are required to explain results or trace them to their causes.*"

Sheldon vs. Benham, 4 Hill 129; 16 N. Y. C. L. Rep. 769.

The court says:

"I see no objection to the testimony of the bookkeeper in relation to these memoranda. He was not called to give a construction, or to declare the legal effect of a written instrument; but as a person skilled in such matters to tell the jury what words these short entries stood for. It is not unlike the case of an instrument written in a foreign tongue, where a translator may be called in to tell the jury how the instrument reads. I think the evidence *properly received.*"

Frick vs. Kabaker, Supreme Court of Iowa; 90 N. W. 498.

Quoting from syllabus:

28. "When the accounts of merchants are in issue, a summary of footings by an expert who has examined their books is admissable."

29. "When an expert testifies on an issue as to a merchant's accounts, as to results of his examination of the merchant's books, the refusal to admit his summary of the footings *of the books is harmless error.*"

Timberlake vs. Brewer, 59 Ala. 108-112. Syllabus 8:

"*An expert may show that the addition is correctly made.* An expert, whether employed or not, who has examined the entries in the different columns, may with the books before the jury, point out the errors in addition previously made, the additions as correctly made, and the aggregate amount of the value of the taxable property of the county *as shown by the book.*"

Burton vs. Driggs, 87 U. S. (20 Wall.) 125; 22 L. Ed. 299:

"When it is necessary to prove the results of voluminous facts, or of the examination of many books and papers and the examination cannot be conveniently made in court, the results may be proved by the person who made the examination. *L. Greenl. Ev.,* Sec. 93. Here the object was to prove, not that the books did, but that they did not show certain things. The results sought to be established were not affirmative, but negative. If such testimony be competent as to the former, *a multo fortiori* must it be so to prove the latter."

INDEFINITENESS OF INDICTMENT.

Some complaint is made by counsel for plaintiffs in error that certain parts of the indictment use the expression "on or about" in its description of the time of the offense. This is true of some parts in the indictment but not of all. In that part as quoted in the brief, found at page 8 of the transcript,

the time is alleged distinctly and clearly in the following words:

"to and including the 2nd day of June, 1908."

The record in this case discloses that no demurrer was ever interposed on behalf of the defendants. No bill of particulars was requested. It would seem that if there was any criticism to be made of the indictment, it might properly have been made at that time.

The trial has now been had and the evidence is direct, positive and certain as to dates of certain matters charged in the indictment. The bank records of the unsuccessful and successful attempts to deposit this government check for $7,417 show positively the date of June 1st, and no dependence upon the uncertain memory of human mind is necessary to establish this date.

Section 1025 of the Revised Statutes, found in volume 2, Federal Statutes Annotated, page 340, reads as follows:

> "(Indictments, defects or form). No indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor

> shall the trial, judgment, or other proceedings thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant."

In the face of this statute, and the certain, positive evidence disclosed by this record, the criticisms of the plaintiffs in error should have little weight with the court.

One of the leading cases from the Federal Reporter is the case of

United States vs. Wood, 127 Fed. 168.

In the case of

State vs. Elliott, 34 Tex. 150, the court says:

> "In this country it is quite uniformly held that the averment of time in an indictment is a matter of form, and not generally material."

citing *Wharton's Crim. Law* 261; *Bishop's Criminal Practice* 237.

See also

Hutchinson vs. State, 62 Ind. 556.

Commonwealth vs. Nailor, 29 Pa. Super. Ct. 271.

Wells vs. Commonwealth, 78 Mass. (12 Gray) 326.

Commonwealth vs. Maxwell, 19 Mass. (2 Pick.) 141.

State vs. Perry, 91 N. W. 765, 117 Iowa 463.

Rema vs. State, 72 N. W. 474, 52 Neb. 375.

Commonwealth vs. Dingman, 26 Pa. Super. Ct. 615.

Am. Dig. Dec. Ed., Vol. 10, pp. 1560, 1561, 1562.

While little space is given in plaintiff in error's brief to a consideration of the voluminous evidence offered to the court in the four volumes of transcript, it is not improper to suggest, in conclusion, certain steps of the evidence which was so definitely and positively woven around the plaintiffs in error.

The record discloses that it was agreed as early as January between Goldberg and Kettlewell that he (Kettlewell) should receive twenty percent of the profits of this combination, Goldberg suggesting that Meyer as his part would receive a similar percentage.

As hereinbefore suggested in this brief, Goldberg admitted upon the witness stand (Tr. p. 795) that he and Corder had for a period of many months prior to this particular fraud been dealing with the government in their several names, but dividing between them the profits made in any award, whether made to Goldberg or to Corder.

The court then will be interested in the irrefutable logic of certain checks that are a part of the record, and which corroborate perfectly the statement of Kettlewell as to the percentage which he was to receive.

The cost to the conspirators of the zinc delivered on requisition 438 was shown by the books of the defendants to be computed as follows:

"59,575 pounds at $5.80 per cwt.	$3,455.35
Freight to Seattle, 59,575 at $1.25 per cwt.	744.69
Freight to Bremerton (Gov. Ex. 23; Trans. p. 588)	60.75
Total cost	$4,260.79"

The profit of the transaction, to be divided among the conspirators, will be shown as follows:

Amount received from the zinc	$7,417.09
Total cost of the material	4,260.79
	$3,156.30

Kettlewell's twenty per cent of this profit of $3,156.30 would come out of either Corder's share or Goldberg's share in any settlement made between Corder and Goldberg.

On June 2, 1908 (Ex. 25; Tr. p. 594), Corder issued to the Great Western Smelting & Refining Company a check for $2,109.60, while on the same day Corder received credit on the books of the Great Western Smelting & Refining Company in the sum of $1,479.60, leaving an unexplained difference of $630.00, which is within $1.00 of the twenty per cent which Goldberg was obligated to pay Kettlewell, and which must have been retained by him for that purpose.

No explanation was attempted by Mr. Goldberg or his capable counsel of the meaning of these convincing and convicting figures.

At or about the time this requisition 438 started on its way the plaintiff in error Goldberg started upon the books of the Great Western Smelting & Refining Company an account designated as a "Bonus Account," in the sum of $5,000.00, and through this account was juggled back and forth those inexplainable items which would have caused serious counfusion if they had appeared on the books of the Great Western Smelting & Refining Company as acts done for and by that corporation. This bonus account fades with remarkable rapidity

during the first two months of its existence. Goldberg's explanation that this was a gift made by his appreciative employers, allowed by them at so much per month and covering a future period of some two or three years, made no impression upon the jury, and was quite in line with the general irresponsibility of his testimony. The testimony of either Goldberg or Meyer, astute and shrewd as the latter must be confessed to be, would have convicted him before the jury. The defense of Meyer centered around the statement of his counsel, and the original declaration of the witness himself, that his relations with Kettlewell were at the time of the conspiracy not not only friendly, but positively unfriendly. Meyer denied that he ever called upon or had any relation with Kettlewell during this period, yet later confessed in his cross-examination that during the time referred to, beginning April 1, 1908, that he had repeatedly visited Kettlewell in the latter's office in Seattle to help him, as he explained, with the over-burdened duties of Kettlewell's office.

The unimpeachable testimony of the ferro-manganese, and other dealers, made a part of the record, telling of other favorite contracts engineered

by Meyer for and on behalf of Goldberg, are convincing beyond doubt as to Meyer's criminal responsibility.

The jury was one of unusual intelligence and listened with patience to this trial of nearly three weeks, and returned its verdict, after reasonable and proper deliberation, against each of the plaintiffs in error.

The verdict of this jury, and the judgment of the court were just and right and should be sustained.

Respectfully submitted,

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